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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Marriage of TARA FRY and TIMOTHY FRY. _____ TARA FRY, Respondent, v. TIMOTHY FRY, Appellant.	B179920 (Los Angeles County Super. Ct. No. ED022273)

APPEAL from orders of the Superior Court of Los Angeles County, Robert P. Applegate, Temporary Judge (pursuant to Cal. Const., art VI, § 21), and Zaven V. Sinanian, Judge. Reversed in part, affirmed in part, and remanded.

Lipton & Margolin and Hugh A. Lipton for Appellant.

Law Offices of Gary W. Kearney and Gary W. Kearney for Respondent.

Appellant Timothy Fry appeals from post-dissolution orders requiring him to make certain payments to his former wife, Tara Fry.[1] Timothy contends that marital assets, chiefly a small disposal business he operated during the marriage, were overvalued, and that the income attributed to him for purposes of determining child support was improperly inflated by including gifts and business expenses. We conclude that the trial court did not abuse its discretion in determining the value of marital assets. The court did err in including the market value of free rental from Timothy's parents in its calculation of gross income and in including the full value of a car and gasoline provided by Timothy's employer without consideration of potential tax liability. We therefore affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Timothy Fry and respondent Tara Fry were married on August 1, 1987, and separated on September 14, 1998. Tara filed a petition for dissolution on October 9, 1998. The couple had three children, then aged 10, 9, and 6.

In June 1999, Timothy agreed to pay monthly family support of $3,158, terminating on Tara's remarriage. Tara was to pay the children's private school tuition out of that amount. A judgment of dissolution was entered on July 5, 2000. The court reserved jurisdiction over all other issues, such as division of community assets. Until December 2000, Tara stayed in the family home, actually owned by Timothy's parents, free of rent. At that point, Tara remarried and moved with her new husband to Santa Clarita. On October 14, 2003, the court modified the family

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[1] Because the couple and certain of their family members share the same last name, we refer to them by their first names.

support order to require monthly child support of $1,856 retroactive to June 1, 2003.

Motion to Set Alternative Valuation Date

The couple's primary asset was the business operated by Timothy -- Valley Roll-Off Service (VRS).[2] The company was engaged in the business of placing large disposal bins at construction sites and hauling the trash away to landfills. Rather than have VRS valuated as of the time of trial, Tara filed a motion to have the court set the date of the couple's separation as an alternative valuation date.[3] The motion was based on the contentions that Timothy was "the sole proprietor of VRS"; that he made "all major business decisions regarding the operation of VRS"; that he did the hiring and firing for VRS; and that VRS was "dependent on [Timothy] for finding and maintaining business for VRS to survive." An evidentiary hearing was set to determine the appropriate date of valuation.

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[2] The company was apparently operated under other names at various times. For simplicity's sake, we refer to the business in all its incarnations as VRS.

[3] Section 2552 of the Family Code provides: "(a) For the purpose of division of the community estate upon dissolution of marriage or legal separation of the parties, except as provided in subdivision (b), the court shall value the assets and liabilities as near as practicable to the time of trial. [¶](b) Upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or a portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner." Unless otherwise indicated, statutory references herein are to the Family Code.

1. Hearing

At the October 2003 hearing, Tara called Mark Kohn, a CPA specializing in forensic accounting. He testified that he requested certain financial documents pertaining to VRS, including accounts receivable, aging reports, bank statements, canceled checks, invoices, customer lists, tax returns, and general ledgers. Kohn received partial information for the period 1998 to 2000. The records he received were insufficient to permit him to give an informed opinion as to the value of the business in 2003. Bank records indicated that the business may have been grossing between $3.5 and $4 million per year in the period between 1999 and 2000. Tax returns indicated very little net or taxable income -- $28,000 or $29,000 in 1998 and $27,000 in 1999.

Timothy testified that VRS was shut down on July 1, 2003, when the property it leased was sold by the landlord. After shutting down the business, Timothy transferred its primary assets -- 50 to 60 disposal bins -- to another entity to pay a business debt.[4]

Timothy testified he had used his best efforts to keep VRS going. Prior to the shutdown, there had been a significant downturn in business. Timothy did not know the precise revenues for 2001, 2002, or 2003, but knew revenue went down every year. At the same time, business expenses went up annually, including dump fees, payroll taxes, wages, and workers' compensation. In addition, the company lost two large accounts due to increased competition by the owners of landfills. Timothy could point to no documents to confirm his statements. Tax returns were not prepared for VRS after 1999.

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[4] Although it did not become clear until a later hearing, the bins were transferred to a business operated by Timothy's father.

Timothy testified that he was the sole salesman for the company, and the only person who generated business and cultivated customers. He and his family had been in the disposal business for a long time. He believed that if he did a good job for his customers by "showing up on time and charging a fair price and being a square dealer," he would be hired again or given a referral.

Timothy conceded that most of his personal living expenses were paid out of the business checking account. This included the mortgage on the family home, purchased for $315,000 and on which his parents had made the down payment.[5] The children's private school tuition was also paid out of the business account. Timothy did not remember the amount of his personal expenses in 1998.

Tammy Polizzotto handled bill paying for VRS from 2001 until 2003. She kept the account records on a computer. She input income and expense items, but never ran a report. She never provided financial reports to any accountant. She did not necessarily keep a copy of the bills or invoices that she had paid. Bank statements and any invoices she had were kept in a drawer, but not in an organized fashion. Polizzotto remembered writing checks for the Frys' children's private school and the Frys' mortgage payment out of the business account. The business checking account was in the negative most of the time. She had no idea how much profit was made by VRS, if any. It seemed to her that there were more bills than money every month. However, she had no documents to support that statement.

Polizzotto testified that although VRS's expenses went up, it could not raise rates due to outside competition. She agreed with Timothy that VRS had lost some of its key customers before it closed down.

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[5] It was established at a later hearing that title to the family home was in the name of Timothy's parents, rather than the couple.

2. Trial Court's Order

After taking the matter under submission, the trial court ruled that valuation would be as of the date of separation. In a written order dated November 4, 2003, it made the following specific findings: "[Timothy] has owned and operated a waste hauling business, [VRS]"; "[t]he business depends on his skill, reputation and guidance for its success or failure rather than the underlying capital"; "[i]t was [Timothy] alone who used his special skills and efforts to win contracts in order to build a successful business"; "[i]t is reasonable to infer that the personal or professional relationships [Timothy] developed with his clients led to the success of the business"; "[m]ore recently, the lack of efforts employed by [Timothy] may have contributed to the downturn in the revenues"; "[t]he court does not find any passive factors, such as inflation, market conditions or the mere passage of time contributed to the increase (or decrease) in the value of the business"; "[t]he evidence also shows that [Timothy] may have engaged in obstructive conduct, such as a willful refusal to deliver the necessary records for valuation of the community business at the time of trial."

The court concluded that because "the factors contributing to the success or failure of the business related to [Timothy's] conduct or personal efforts, . . . the only way to effect division of the asset in an equitable manner is by the utilization of an alternate valuation date [and] the proper date of valuation is the date of separation."

Trial

Trial took place in March 2004. The primary issues at trial were the value of VRS at the date of separation and child support. Timothy again testified concerning the nature of the business. In 1998, there were seven or eight employees. Tax returns were not prepared for the years 1999 through 2002. The

1998 return had been filed in 2004. A report produced at trial showed that for 2002, VRS received over $1.74 million in gross revenues in 2002 and over $1.44 million in 2001. These figures were based on customer invoices, and did not include customers who paid up front on delivery of a disposal bin, without an invoice having been issued. Timothy believed receipts were higher in 1997 and 1998 than they were in 2001 and 2002. Many of the company's financial documents had been lost or discarded.

Timothy's father, Tom Fry, was also in the waste removal business. Timothy transferred the bins and trucks formerly owned by VRS to his father's business. At the time, VRS owed Tom Fry's company for disposal fees incurred many years earlier.

During the period the business was operational, Timothy used whatever funds he needed to pay his personal and family expenses, rather than taking a specific salary. He estimated he was paid or took out approximately $6,000 per month from VRS when it was operational.

With respect to the couple's lifestyle or living expenses, Timothy testified that in 1997, he and Tara lived in a house in Sun Valley. When they purchased the house, he signed out loan papers but did not review what the mortgage broker had filled in regarding his annual income. The house was 2,500 or 2,700 square feet, had four bedrooms, and was on one-third to one-half acre. He and Tara each drove a Yukon. Total car payments were $1,200 per month. In 1997, they constructed a pool at the house that cost $23,500. He believed Tara borrowed $18,000 or $19,000 of that from her father. He paid Tara's father back by giving him a $10,000 check and one of the Yukons. The children's school tuition cost $1,300 to $1,400 per month. In 1998, the family went on vacation to Maui. In 1997, he and Tara went on a two- or three-day cruise to Mexico and took two or three weekend trips to Las Vegas. His family went to Laguna Beach for a week and to Palm

Springs without him. One of the couple's daughters took horseback riding lessons. Timothy owned a car that was raced at the Saugus Speedway. He did not, however, have any documentation of his family's personal expenses for 1997 and 1998.

The couple's tax return for 1997 showed an income of $27,787; the tax return for 1998 showed income of $27,720. Invoking the Fifth Amendment, Timothy refused to testify concerning whether those numbers were accurate.

With respect to his earnings and lifestyle at the time of trial, Timothy testified he was employed by Holtz Construction, earning $20 per hour and working 36 hours per week, for a total of $3,000 per month. His employer paid for his car and for gas used for work-related travel. Since 2001, he had been paying from VRS's account the mortgage on a house in Thousand Oaks that his friend "Karen" resided in and that he stayed in part time. That house was in foreclosure. Timothy stayed the rest of the time in the family home, still owned by his parents. He paid nothing to live there except the telephone bill. Similar houses in the area rented for $2,500 per month. Timothy had been paying for the children's private school tuition, but had not paid any additional child support since October 2003.

Tom Fry testified that he had been in the disposal business for 44 years. In 2002, he paid or loaned VRS $30,000 in anticipation of Timothy's coming to work for his company, which never occurred. In addition, Tom testified VRS had owed his company money since 1998 for dump fees and clean up. The 62 bins transferred to Tom's company when VRS shut down were worth $100,000 to $110,000, total. The trucks were worth less than the balance due on them.

Tom estimated that VRS would have been worth seven times monthly gross minus dump fees, had Timothy agreed to continued to work for the company after transfer of ownership and had the revenue been coming from customers with regular contracts. If the company's revenue were coming from one-time jobs, the

multiple would go down to four or five times revenue. Tom based this on having purchased 20 disposal companies in the past, paying from $10,000 to $1 million for them. Dump fees in general were 40 to 50 percent of gross.

John Richardson, who worked for Tom's company, testified that Timothy told him that VRS had around $150,000 to $180,000 in revenue per month in 2003. When Tom's company took over the existing accounts, Richardson calculated that VRS's gross revenue was actually around $100,000 per month. Richardson believed that in evaluating a disposal business like VRS, standing or long-term accounts were worth four to six times monthly gross and one-time customers were worth two to three times monthly gross. He estimated dump fees were around 35 per cent. That made VRS worth $400,000 in 2003, in Richardson's estimation.

Tara testified concerning the family's lifestyle and expenses in 1996, 1997, and 1998. She and the children took karate lessons at a cost of $330 per month. A housekeeper came in to clean for approximately $40 per week. Her daughter took horseback riding lessons and owned a horse. Board for the horse was $120 per month, and lessons were $45 per hour, once or twice a week. The family went to Sea World one weekend every year and stayed at a hotel that cost $340 per night. She and Timothy went to Las Vegas every four to six months, and stayed in a two-room suite that cost $900 to $1,200 per night. They went on several cruise vacations during their marriage, and also vacationed in Florida, Mexico, and Tahoe. The younger son raced go-karts. Timothy owned two race cars. The swimming pool they added to the family home cost $52,000. The funds to pay for it came from VRS, not Tara's father. The kitchen was remodeled in 1998. The couple purchased a new car every two to three years. Tara had driven a BMW and a Mercedes in the past, and was driving a Yukon at the time of separation. She owned three mink coats. She had been given two items of jewelry, a wedding ring

and a diamond heart, that had disappeared since the separation. She had a picture of the children on a boat owned by the "Fry family."

Mark Kohn, the forensic CPA, testified that he had not been given sufficient reliable financial records to calculate a value for VRS in the usual manner. Instead, he based his opinion of the company's annual income and its market value on the couple's expenditures during the pertinent period. Using the information provided him by Tara concerning family lifestyle and expenses, including the understanding that they owned a "yacht," he expressed the opinion that the couple lived like those earning $500,000 per year. However, he reduced that figure to $375,000 to start his calculations. He concluded that VRS's "excess earnings" were $234,000, a figure he arrived at by deducting $100,000 as a reasonable salary for Timothy and $41,000 representing return on equity. He then multiplied $234,000 by three to come up with $700,000 for the value of the business's goodwill. He checked that figure by using Tom Fry's formulation for valuing a disposal business. Assuming a monthly gross of $173,000, disposal fees of 37.5 per cent, and a multiplier of 6.5, he came up with a similar number for VRS's goodwill. He then added in assets obtained from the company's tax return and subtracted documented debt to come up with a total value of $1.113 million for VRS as of December 31, 1998.

Kohn did not subtract from the value of VRS the debt allegedly owed Tom Fry's business because he saw nothing to authenticate that it was a valid debt. He did not take into account any pending litigation.

Timothy called Ben Eubanks, an appraiser, to evaluate VRS. The court, however, struck his testimony, agreeing with Tara's counsel that he lacked the necessary training, education, and experience to evaluate a disposal business.

On rebuttal, Timothy testified that he paid out approximately $100,000 to settle lawsuits pending in 1998. He denied that the family went on a Caribbean

cruise and said that the only extended vacation they took as a family was to Maui. He denied having any interest in the boat the family occasionally used, which he described as his father's fishing boat. He said he did not own any race cars, but partially sponsored one for approximately $400 per month. The court sustained objections to specific questions concerning the amount he took out of the business for personal expenses in 1998 on the ground that Tara's counsel would not be able to cross-examine him due to his prior decision to assert his Fifth Amendment rights with respect to the couple's tax returns.

After testimony had concluded, it was stipulated that Tara could earn from $18,700 to $25,300 per year if she worked full time.

Trial Court's Ruling

The court found the value of VRS as of the date of separation to have been $1,113,130. The court stated in its order that "[a]lthough cross-examination by [Timothy's] counsel raised serious doubts about the assumptions underlying the conclusion of [Tara's] expert, the evasiveness and dishonesty of [Timothy] compel the court to resolve all doubt against him." The court gave or attributed VRS to Timothy at its 1998 value, and added certain other marital assets, including the Yukon given to Tara's father and the missing diamond ring and necklace. Timothy was ordered to make an equalizing payment of $463,665 to Tara based on the value of the assets attributed to him.

Turning to the issue of child support, the court imputed $22,100 in income to Tara. It concluded that Timothy was earning or was capable of earning $6,817 per month based on $800 per week in salary plus $650 per month for the value of the company car, plus $200 per month for the value of the gasoline paid for by the company, plus $2,500 per month for the value of the free rental of the house in Sun

Valley. Timothy was ordered to pay child support of $655 per month, plus private school tuition of $1,248 per month.

DISCUSSION

I

First, Timothy challenges the court's decision to value VRS as of the date of separation. As set forth above, section 2552, subdivision (a), provides that "except as provided in subdivision (b), the court shall value the assets and liabilities as near as practicable to the time of trial," but under subdivision (b) provides that "the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner."

In re Marriage of Duncan (2001) 90 Cal.App.4th 617 explains the rationale behind section 2552: "When a spouse operates a community property business after separation, there is an inherent tension between the general rule that the business must be valued as of the date of trial [citation] and the rule that a spouse's earnings after separation are his or her separate property. [Citations.] Before 1976, the only method a court had to ameliorate the effects of a trial date valuation was to equitably apportion a spouse's postseparation efforts between community and separate interests. [Citation.]" (*Id.* at pp. 624-625.) Section 2552 (originally Civil Code section 4800, subdivision (a)) was designed originally "to remedy certain inequities such as 'when the hard work and actions of one spouse alone and after separation . . . greatly increases the "community" estate which must then be divided with the other spouse.'" (*Id*. at p. 625, quoting *In re Marriage of Barnert* (1978) 85 Cal.App.3d 413, 423, emphasis omitted.) In other words, "[the] exception to trial date valuation applies because the value of [certain] businesses, 'including goodwill, is primarily a reflection of the practitioner's services

(accounts receivable and work in progress) and not capital assets such as desks, chairs, law books and computers. Because earnings and accumulations following separation are the spouse's separate property, it follows [that] the community interest [in those types of businesses] should be valued as of the date of separation -- the cutoff date for the acquisition of community assets." (*In re Marriage of Duncan, supra,* 90 Cal.App.4th at pp. 625-626, quoting *In re Marriage of Stevenson* (1993) 20 Cal.App.4th 250, 253-254.)

Despite its genesis, section 2552 has also been used to alleviate a different type of inequity. In *In re Marriage of Stallcup* (1979) 97 Cal.App.3d 294, the trial court valued community assets at the date of separation due to the failure of the husband to produce financial documents; the husband argued this was error. The court rejected his contention, noting that the husband had "refus[ed] to deliver relevant materials," and that there were inconsistencies between his testimony, his deposition statements, and bank loan documents regarding his more current assets and liabilities. Because the earlier date "was established in order to simplify the accounting and to eliminate the inference that the failure to provide discovery was calculated to conceal evidence unfavorable to husband," the court of appeal found "good cause" to justify the trial court's decision. (*Id*. at p. 301.) "Having failed to provide timely evidence of his claimed post-1973 business reverses, husband may not now benefit from the confusion thus created . . . ." (*Ibid*.)

More recently, in *In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, the husband's expert stated that the wife's business could not be adequately valued because of her poor recordkeeping. The husband therefore asked the trial court to value the business as of the date of separation using information gleaned from a tax return, an eight-month income statement, and a six-month profit-loss statement. The trial court agreed. On appeal, the wife contended that the trial court had abused its discretion in finding good cause to value the business as of the date of

separation, because there was no evidence that her bad bookkeeping was intentional. The appellate court disagreed: "There is no requirement in a 'bad bookkeeping' case that the proprietor must have intentionally created the uncertainty." (139 Cal.App.4th at p. 1551.) Relying in part on the holding in *Stallcup*, the court stated: "Though the trial court in *Stallcup* inferred that the husband was intentionally concealing information, the appellate holding does not rest upon intentional concealment. The pivotal point of the case is simply that a party may not benefit from confusion for which he or she is responsible. [Citation.] Stated another way, when a party precludes an expert's trial-date valuation because he or she does not provide needed information, a valuation as of another time is appropriate because it is made 'as near as practicable to the time of trial.' (§ 2552, subd. (a).)" (*Ibid*.)

In the instant case, the inability to value VRS at the time of trial was unquestionably due to Timothy's failure -- whether deliberate or due to sloppiness -- to produce organized and coherent records for the business. He conceded that he did not run reports from the information kept in the computer or retain back up documents, such as bank statements or copies of bills and invoices. It appeared from the testimony that a significant part of income information never reached the computer operator, as some customers paid cash on delivery and were not invoiced. Moreover, the documents that did exist, such as tax returns and loan applications, were unreliable. Under the reasoning of *Nelson*, with which we agree, that was sufficient "good cause" to justify assigning an earlier valuation date. The trial court was not required to find that the failure to provide relevant financial documents was intentional in order to exercise its discretion under section 2552 to value the business as of the date of separation. *(In re Marriage of Nelson, supra*, 139 Cal.App.4th 1546.)

II

Next, Timothy challenges the court's reliance on Kohn's expert testimony in valuing VRS. Timothy contends in his brief that Kohn's methodology was "spurious" and that he could have "merely researched the market to find out what these types of business sold for on a regular basis based upon the expert's understanding of the size of the business, the trucks that were possessed, and the dumpster bins that were owned."

The formulation suggested in the brief does not match any formulation discussed in the record. Tom Fry and Richardson both testified that the accepted method of valuing a disposal business was to use a certain multiplier on long-term accounts and a different, smaller multiplier on short-term or one-time customers after deducting landfill expenses. Kohn used a different methodology -- applying a multiplier of three to annual "excess earnings." However, he checked his final figure by doing a rough calculation based on the alternate methodology, using an average multiplier and average landfill expense for all accounts, and came up with a similar result.

"The courts have not laid down rigid and unbending rules for the determination of the value of goodwill but have indicated that each case must be determined on its own facts and circumstances and the evidence must be such as legitimately establishes value. [Citations.] . . . [¶]A proper means of arriving at the value of such goodwill . . . contemplates any legitimate method of evaluation that measures its present value by taking into account some *past* result, and assuming the business will continue in the future." (*In re Marriage of King* (1983) 150 Cal.App.3d 304, 309; accord, *In re Marriage of Iredale & Cates* (2004) 121 Cal.App.4th 321, 329.) Kohn's testimony that the formula he used was an accepted way of valuing small businesses was uncontradicted, and the fact that he reached a similar result using a different methodology further supports its validity.

Timothy further criticizes Kohn for using the couple's lifestyle, rather than "other reasonable and appropriate factors," to determine the excess earnings figure on which his opinion as to valuation was grounded. Certainly, financial documents setting forth a company's income and expenses are the most accurate way to calculate the company's market value. Here, however, it was undisputed that numerous financial records were unavailable. Kohn was not required to rely on documents purporting to summarize income and expenses for various years when (1) they were not kept in the regular course of business, and (2) there were no backup documents against which to test the accuracy of the summaries. The choice, therefore, was between using incomplete and potentially unreliable records or devising an alternate method of establishing the company's income during the relevant period. As Timothy admitted paying all or most of the family's personal expenses out of the business account after paying company bills, it was reasonable to consider the expenditures that financed the family's lifestyle in establishing VRS's approximate income. (Cf. *United States v. Gellman* (11th Cir. 1982) 677 F.2d 65 [evidence of amount necessary to finance taxpayer's lifestyle admissible in prosecution for failure to file income tax returns]; *In re Rigney* (Bankr. N.D.Ala. 1997) 216 B.R. 65 [where taxpayers' expenditures on luxury items far exceeded their claimed income, fraud could be inferred].) Having rendered a traditional valuation impossible due to his failure to keep or produce complete business records, Timothy cannot complain about the expert's use of an alternative method.[6]

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[6] Although Timothy's brief points out potential discrepancies in Kohn's calculation, such as his apparently mistaken belief that the couple owned a "yacht," he does not follow up with any specific argument concerning how that affected the final calculation. In any event, Kohn testified that he deeply discounted his conclusion concerning the couple's annual expenditures before he began his calculation of VRS's excess income and market value; a few potential mistakes in his underlying assumptions would not change the outcome.

III

Finally, Timothy raises two challenges to the award of child support: (1) the court erred in imputing income to him in the amount of $2,500 per month, representing the market value of the free rent he receives from his parents, and (2) the court erred in imputing monthly income of $650 and $200, representing the court's estimation of the value of the automobile and gasoline provided him by his employer.[7]

We turn to the question whether a parental gift in the form of free rent may be considered part of a spouse's income. Before we discuss the relevant authorities, we briefly summarize the manner in which child support is calculated under the governing statutes. The Legislature has enacted a "statewide uniform guideline" in order to "ensure that [California] remains in compliance with federal regulation for child support guidelines." (§ 4050.) Courts are to "adhere to the statewide uniform guideline" and may depart from it "only in the special circumstances" set forth elsewhere in the enactment. (§ 4052; see also § 4053, subd. (k) ["The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula"].)

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[7] In his opening brief, Timothy contended that the court abused its discretion in requiring payment of private school tuition. In his reply brief, Timothy admits the child support ordered by the court is currently within the guidelines for someone with his imputed income, even when the tuition payment is included. Thus, we need not address the question of private school tuition at this time. If, after remand, the court orders Timothy to pay sums outside the guidelines, the issue may be raised at a later time.

Section 4055 contains an algebraic formula that requires the input of the "total net disposable income per month" for each parent.[8] (§ 4055, subd. (b)(3).) Section 4059 defines "net disposable income" as the parent's "gross income" after certain specific items are deducted. The enumerated items are state and federal income tax liability, FICA contributions, mandatory union dues, retirement benefit contributions, health insurance premiums, other child support obligations actually being paid, necessary job-related expenses, and "[a] deduction for hardship as defined by Sections 4070 to 4073."[9]

Gross income is broadly defined by section 4058 as "income from whatever source derived" and "includes, but is not limited to," such items as salaries, royalties, bonuses, rents, dividends, pensions, and interest, as well as benefits from workers' compensation, unemployment, disability, and social security. Under subdivision (a)(3), gross income may include "[i]n the discretion of the court, employee benefits or self-employment benefits, taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts."

In *In re Marriage of Schulze, supra,* 60 Cal.App.4th 519, the court addressed the interpretation of section 4058 where the husband was receiving subsidized rent from his parents. The husband was employed by his parents' manufacturing company and had earned a significantly higher salary in the years prior to the separation and divorce than in the years after. The Court of Appeal agreed with

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[8] As explained in *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 523-524, fn. 2, due to the complexity of the formula, courts use a computer program -- one is called DissoMaster -- to actually calculate the child support number.

[9] This is generally based on ill health or the needs of other children the spouse is supporting. (See § 4071.)

the trial court that the subsidy, or at least part of it, should be attributed to the husband. Nevertheless the holding is helpful to Timothy rather than Tara, because the court's holding centered on the employment relationship and the definition of income for tax purposes. As the court explained: "Not even the IRS would be so prehensile as to claim that a *parent's* allowing an adult child to live in a condominium owned by a parent represented taxable income to the child, at least under ordinary circumstances. [¶] The problem here is that the circumstances are not ordinary. [The husband's] parents are also his *employers*, and the imputation of the free rent may be upheld as compensation from those employers. [¶] The trial judge was unimpressed with the maneuver of trying to reduce [the husband's] income during the pendency of his divorce . . . , and made an implied finding that the value of the rent reduction represented *compensation* for his services as sales vice president, not a gift from parent to child. (Cf. Int.Rev. Code, § 119 [implying that value of lodgings furnished employee is income when *not* furnished for the convenience of the employer].)" (60 Cal.App.4th at pp. 528-529.)

Nevertheless, the *Schulze* court held, the trial court erred in imputing the full amount of the rent subsidy to the husband, along with the full value of a company car, on the theory that such income was not taxed or taxable. The court's rationale was again based on the similarity of the definitions of income in the Internal Revenue Code and section 4058, and is relevant both to Tara's theory that the gift of free rent from a parent should be imputed as income to Timothy, as well as her contention that funds for reimbursement of business-related travel expenses were properly included. The court stated: "The trial judge characterized the imputed income as 'nontaxable,' but such a characterization runs counter to the inclusion of the items as 'income' within section 4058 in the first place. Section 4058 does not mention gifts or other 'freebies' that come one's way in life: The operative language in subdivision (a), i.e., 'annual gross income . . . means income from

whatever source derived,' was lifted straight from the definition of income in section 61 of the Internal Revenue Code. The only 'benefits' which are mentioned in section 4058 [subdivision (a)(3)] are *employee* or *self-employment* benefits. (See § 4058, subd. (a)(3).) If the [car] and the [rent subsidized] condo were truly 'nontaxable,' it would be because they were *gifts* to [the husband] from his parents, not a form of compensation. *Gifts are not mentioned in section 4058, and, judging from the use of language lifted straight from the Internal Revenue Code, should logically be outside the purview of the child support statute. Gross income, in federal tax law, does not include gifts*. [Citations.]" (*In re Marriage of Schulze*, *supra*, 60 Cal.App.4th at p. 529, fn. omitted, first italics in original, second italics added.)

Two cases cited by Tara, *Stewart v. Gomez* (1996) 47 Cal.App.4th 1748 and *County of Kern v. Castle* (1999) 75 Cal.App.4th 1442, reached a contrary result.[10] In *Stewart*, the husband was receiving a small disability payment and living rent-free in housing on an Indian reservation. The trial court included the value of that housing in calculating his gross income and child support obligations, and the appellate court agreed that "the reasonable value of nonmonetary benefits received by a parent [is] chargeable as part of the parent's gross income." (47 Cal.App.4th at p. 1752.) The court recognized that section 4058's language giving the court discretion to consider as income "*any . . . reduction in living expenses*" appeared only in subdivision (a)(3), expressly relating to "'employee benefits or self-employment benefits,'" but believed that courts were not limited by the listed inclusions. (*Id*. at pp. 1754-1755.)

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[10] *Stewart* was decided one year before *Schulze*, and the court in *Castle* did not discuss or acknowledge the existence of *Schulze*.

In *Castle*, the husband received a post-dissolution inheritance allowing him to pay off his mortgage and live free of that obligation. As in *Stewart*, both the trial and appellate courts found this to be a reduction in living expenses that justified imputing additional income to the husband, notwithstanding the fact that it was not employment or benefit related.

A few years later, in *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, the *Schulze* court reiterated its position that gifts should not be considered income under section 4058 and explained why, in its view, *Stewart* and *Castle* were wrongly decided. In *Loh*, the wife sought an increase in child support based on the husband's lifestyle. Although he had lost his lucrative position as a stockbroker and was earning considerably less in his new career, he was being "subsidized" by the income of a nonmarital partner with whom he was residing. The court explained why gross income for purposes of child support calculations should be limited in accordance with its prior opinion: "[T]he use of income as stated on a tax return accords with the Legislature's goal of uniformity and expedition. Section 4050 refers . . . to a 'statewide uniform' guideline, and determining income by using tax returns has the advantage of not only being relatively easy, but . . . ,[being] enforced by federal and state civil and criminal penalties. It also spares chronically overcrowded family courts the burden of determining income on an ad hoc basis, with the risk of inconsistent results. [¶] . . . [¶] Accordingly, much of the jurisprudence governing determination of income has followed, or been consistent with, basic income tax law principles. That is, if one knew the tax law, one could predict whether a given item would, or would not, be included in section 4058 income for purposes of the guideline calculation. (E.g., *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269 [proceeds from sale of stock acquired by stock options should have been included as income]; *In re Marriage of Scheppers* [(2000)] 86 Cal.App.4th 646, 649-651 [life insurance proceeds received

upon death of eldest child *not* income because, among other reasons, such proceeds are not income under Internal Revenue Code and are not derived from labor, business or property]; . . . *In re Marriage of Rocha* (1998) 68 Cal.App.4th 514, 516-517 [proceeds from a student loan not income because of expectation of repayment] . . . ." (*In re Marriage of Loh, supra,* 93 Cal.App.4th at p. 333.)

The court in *Loh* identified *Stewart* and *Castle* as two cases that had "departed altogether from an income tax model of section 4058 income." (93 Cal.App.4th at p. 333.) To the degree that those cases stood for "a blanket 'anything that reduces living expenses' approach to section 4058 income," the court in *Loh* "respectfully decline[d] to follow them." (*Id*. at p. 334.) The court gave as one of its reasons for keeping to its original position the fact that, in situations like *Stewart,* where the husband was living rent free but bringing in only a small disability payment, "the support order was based on money that the [husband] did not have." (*Ibid*.) Further, the court believed the *Stewart/Castle* approach did not represent a proper interpretation of the governing statutes: "The *Stewart* opinion cited subdivision (a)(3) of section 4058 as authority for including the free Indian reservation housing as income. [Citation.] But the actual text of subdivision (a)(3) confines benefits that result in a 'corresponding reduction in living expenses' to 'employee benefits or self-employment benefits.' Having expressly mentioned the 'corresponding reduction in living expense' idea only in the context of employee or self-employment benefits, the natural inference is that the Legislature didn't want trial courts bogged down in benefit debates *outside* of that context." (*Id*. at p. 335.)

Finally, "the [*Stewart/Castle*] approach is out of step with the basic flow of the child support statutes. As we have demonstrated, the Legislature has set up a system where tax return income can presumptively (and, despite the complication

of the actual formula in § 4055, rather easily) be used to 'compute' net disposable income." (93 Cal.App.4th at p. 335.)

The court in *Loh* was further convinced of the correctness of its conclusion by the fact that the statutory scheme adopted by the Legislature created specific exceptions that took into account any inequity that might result from strictly following the formula. First, section 4058, subdivision (b) specifically permits the court, in its discretion, to "consider the earning capacity of a parent in 'lieu of the parent's income.'" (§ 4058, subd. (b); see *In re Marriage of Loh*, *supra*, at p. 333.)

Second, section 4057 permits the court to disregard the formula under certain circumstances, including where "[a]pplication of the formula would be unjust or inappropriate due to special circumstances in the particular case." (§ 4057, subd. (b)(5).) The court in *Loh* pointed out that in a situation such as *Castle*, where a substantial inheritance had eliminated the husband's mortgage obligation and freed up a substantial amount of cash, section 4057 would allow the court to "adjust the [formula] amount upward in light of the free housing benefit." (93 Cal.App.4th at p. 335.) Use of the "escape valve" provided by section 4057 "respects the rebuttable correctness of the mechanically calculated guideline amount, and allows child support awards to properly reflect the parents' standard of living without doing violence to the word 'income' in a way that would make the Sheriff of Nottingham proud." (*Id*. at pp. 335-336.)[11]

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[11] Use of section 4057 to alter or supplement the formula imposes additional requirements on the parties and the court. In particular, "to comply with federal law," the trial court must "state, in writing or on the record, the following information whenever the court is ordering an amount for support that differs for the statewide uniform guideline formula amount under this article: (1) The amount of support that would have been ordered under the guideline formula[;] (2) The reasons the amount of support ordered differs from the guideline formula amount[;] [and] (3) The reasons the amount of support ordered is consistent with the best interests of the children." (§ 4056, subd. (a); see § 4057, subd. (b) [the

After careful review of the governing statutes and the competing authorities, we find ourselves in agreement with the *Schulze* analysis. In the majority of cases, child support is to be calculated by starting with the parties' gross incomes, subtracting a handful of enumerated items, and then plugging the result into an algebraic formula. Here, the trial court erroneously input into the formula a non-income item -- the $2,500 per month value of housing given to Timothy as a nonemployment-related gift from his parents. There is no need to stretch the definition of gross income beyond recognition if the goal is to take an unusual asset into consideration. The statutory scheme provides a method for rebutting the presumptive correctness of the standardized calculation where unusual circumstances arise and provide additional child support for the custodial spouse. At the same time, the statutory method protects the spouse who has received a non-income asset by permitting the court to calculate its impact on child support outside the strict requirements of section 4055. Where the benefit at issue is in the form of a non-monetary subsidy that does not put an additional dollar in the pocket of the receiving spouse, it would be unfair to attribute the full amount to him or her and then input it into a rigid formula. If enhancement of Timothy's child support obligations beyond the standardized formula is found to be necessary due to his unusually low living expenses, the protections of sections 4056 and 4057 must be provided.

With respect to the free car and gasoline allowance provided by Timothy's employer, as *Schulze*, *supra*, 60 Cal.App.4th at pp. 528-529, makes clear, such

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presumption of the correctness of the formula may be rebutted "by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case" because "one or more of the . . . factors [set forth in section 4057] is found to be applicable," and "the court states in writing or on the record the information required in subdivision (a) of Section 4056"].)

employer-provided benefits may properly be considered gross income under section 4058, subdivision (a)(3). At the same time, section 4059, subdivision (f), requires that the court, in calculating net disposable income, deduct from gross income any "[j]ob-related expenses, if allowed by the court after consideration of whether the expenses are necessary, the benefit to the employee, and other relevant facts." This means that the court should deduct that portion of the value of car and gasoline funds that represent reimbursement of expenses legitimately incurred by Timothy in job-related travel.[12] In addition, where employer-provided benefits are included as income, the court must calculate the extra income tax the receiving spouse would have to pay, because "section 4059, subdivision (a) states that '[t]he state and federal income tax liability resulting from the parties' taxable income' *shall* be deducted from each parent's annual gross income." (*In re Marriage of Schulze*, *supra*, 60 Cal.App.4th at p. 530.)

The record here indicates that the court added the full value of the car and gasoline funds Timothy received from his employer without (1) considering what portion of the funds and car, if any, to attribute to reimbursement for employment-related business expenses or (2) reducing for potential tax liability. On remand these matters should be considered.

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[12] "'[J]ob related expenses clearly include costs directly incurred for employment purposes -- e.g., tools, uniforms, etc., [and] also arguably include[] any other unreimbursed costs that would not be incurred but for employment -- e.g., on the job parking expense, and transportation and mileage for commuting to and from work.'" (*Stewart v. Gomez*, *supra*, 47 Cal.App.4th at p. 1755, quoting Hogoboom & King, Cal. Practice Guide: Family Law I (The Rutter Group 1996) [¶]6:226, p. 6-69, italics omitted.)

DISPOSITION

The post-dissolution orders are reversed with respect to the calculation of child support only. In all other respects, the orders are affirmed. The matter is remanded for recalculation of child support in accordance with the views expressed in this opinion. Each party is to bear his or her own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.